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SEIZING THE MOMENT WITH RECEIVERSHIP:
The Applicability of Receivership within the Foreclosure Setting

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When Demosthenes was asked what was the first part of oratory, he answered "Action" and which was the second, he replied "Action" and which was the third, he still answered "Action." Similarly, if one were asked what the three parts of an effective strategy are in the context of foreclosing on commercial real property, the answers would inevitably be "Action, Action and Action." The reason for this answer is quite simple and may be explained by a quote from Miguel de Cervantes: "Delay always breeds danger." Simply put, when a borrower falters, the longer the lender delays in attaching the assets securing the borrower's obligations, the more danger there is the lender's recovery will be impaired.

Is there, then, any legal strategy in the context of the foreclosure of commercial real property that can inject the element of "Action" to a lender's attempts to speedily gain effective control of its collateral? The answer is "Yes" and that answer is "Receivership." The ancillary equitable remedy of receivership when asserted in the context of a foreclosure proceeding can deprive a borrower of possession of the real property collateral and vest possession in a court appointed Receiver who can manage said collateral as an officer of the Court.

The statutory basis for the remedy of receivership is found in N.C. Gen. Stat. §1-502. In pertinent part, §1-502(1) provides that "[a] receiver may be appointed before judgment…, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired..." Even more importantly, the North Carolina Supreme Court has recognized that in North Carolina the remedy of receivership is not circumscribed by any statutory enactment, but is part of the inherent equitable jurisdiction of the trial court. "Furthermore, even if the findings did not support a determination that insolvency was imminent within the purview of the statute, it is elementary that a Court of Equity has the inherent power to appoint a receiver, notwithstanding specific statutory authorization." Lowder v. All Star Mills, Inc., 301 N.C. 561, 576, 273 S.E.2d 247, 256 (1981) (citing Skinner v. Maxwell, 66 N.C. 45 (1872)). "The appointment of receivers is one of the oldest remedies known to chancery, Blum Bros. v. Girard Nat. Bank, 248 Pa. 1478, 93 A. 940 (1915), and one of the most common instances in which a receiver may be appointed is where it is necessary 'to preserve, pendente lite, specific property which is the subject of litigation.'" Id. (citing Sinclair v. Moore Central Railroad Co., 228 N.C. 389, 395, 45 S.E.2d 555, 560 (1947)). The significance of the quoted passages is that the North Carolina Supreme Court has recognized, by implication, that a trial court, and litigants, using the flexible principles of equity, are free in a foreclosure proceeding to creatively formulate a remedy which allows administration of the real property collateral, pending a final adjudication in a pending foreclosure, in a manner which preserves and enhances the value of the

collateral. To be sure, the equitable jurisdiction of the court should be exercised cautiously, but it would appear given the strong statements in Lowder respecting the equitable basis of receivership, that an appellate court would uphold a trial court's establishment of a receivership, absent an abuse of discretion. See Lowder, 301 N.C. at 577, 273 S.E.2d at 256. In general, where a borrower is clearly in default of its obligations to lender, the loan documents explicitly provide for the remedy of receivership and an assignment of rents, and if there is any hint of financial mismanagement, a court should look favorably upon a request for receivership. See Wachovia Bank and Trust Co. v. Carrington Dev. Associates, 119 N.C. App. 480, 459 S.E.2d 17 (1995). Quoting Lowder, the Wachovia court also significantly points out that the liability of the lender for the administration of the property by a receiver is limited if not non-existent due to the fact that the Receiver is not viewed as the agent of the lender: "[t]he position of the receiver is that of an officer of the court… He is not appointed for the benefit of either party and does not derive his authority from either one. The parties have no authority over him…" See Wachovia 119 N.C. App. at 489, 459 S.E.2d at 22.

The procedures established in North Carolina for non-judicial foreclosure are relatively standard and well established. See N.C. Gen. Stat. §45-21.16 et. seq. However, even with the smoothest prosecution of a foreclosure proceeding, it will realistically take at least 90 days to get possession of the collateral, and, if appeals are pursued, the time it will take to obtain possession of the collateral will be extended even more. Receivership, if properly asserted in conjunction with a foreclosure action, can be the fulcrum remedy which eases the dangers to the collateral created by the inherent delay of litigation.

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